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BRIEF FOR APPELLEES AND APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Consolidated Cases Nos. 13,201 and 13,202

GRAHAME THOMAS SMALLWOOD, JR., ET AL., *Appellants*,

v.

VIOLA A. HODSON, ET AL., *Appellees*.

Appeal from the United States District Court for the District of Columbia

United States Court of Appeals
For the
District of Columbia Circuit

FILED

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Joseph W. Stewart

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QUESTIONS PRESENTED

1. Appellants as part of their case in chief called Appellee Hodson as an adverse witness and cross examined her as to statements sworn to by her in a Petition De Lunatico Inquirendo filed April 30, 1954. The judge permitted such cross-examination. Appellants then sought to offer into evidence the petition accompanied by affidavits of two physicians to the effect that Dorothy Smallwood Geare was of unsound mind as of April 29 and 30, 1954. The physicians were available to testify in person. The questions of mental capacity related to February 2, 1954. There was never any adjudication of insanity as Geare was discharged one week after Petition was filed. The question is: whether it was error to exclude the affidavits.

2. Portions of records of Emergency Hospital for the period of April 18, through April 30, 1954, were admitted into evidence. Two physicians from St. Elizabeth's Hospital testified. Appellee Hodson was cross-examined at length as an adverse witness in the light of the foregoing evidence. She was also cross-examined relative to statements made by her to an official at St. Elizabeth's Hospital relative to the patient's history. Appellants did not produce the official but sought to contradict her by introducing an unsigned statement from the St. Elizabeth's Hospital files, containing other than routine entries. The question is: Was this statement properly excluded?

3. The Trial Court gave a full and complete charge to the jury and subsequently answered questions from the jury. Was it error to state to the jury that each juror, without giving up his convictions should give careful weight to the views of the majority, after a trial lasting five Court days, in an effort to reach a unanimous verdict?

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---

BRIEF FOR APPELLEES AND APPENDIX

COUNTERSTATEMENT OF CASES

A. Case No. 13,201

Case No. 13,201 arises out of an action by Appellants Grahame Thomas Smallwood, Jr., Elizabeth S. Wier, and Eleanor S. Beasley, plaintiffs below, against Appellees Viola A. Hodson and Margaret Hynson Studt, defendants below, to set aside a deed dated February 2, 1954 convey-

ing an equity in lot 83 in square 2061 known as 3047 Porter Street, N. W., in the District of Columbia from Dorothy Smallwood Geare, grantor, to Viola A. Hodson and for an accounting. Pursuant to an agreement made with Dorothy Smallwood Geare, Viola A. Hodson on April 13, 1954, conveyed an undivided one-half interest in the real estate to Margaret Hynson Studt. Geare died on December 28, 1954. Appellants contended: (1) that Dorothy Smallwood Geare lacked mental capacity to make the deed on February 2, 1954, and (2) that the deed was obtained by fraud, deceit, undue influence, duress or coercion. These contentions were denied by appellees and trial before a judge ensued on these issues.

This case was ordered by the District Court to be tried simultaneously with Case No. 13,202 which was a will contest involving the will of Dorothy Smallwood Geare dated February 2, 1954. The two cases were so tried, Case No. 13,201 being tried to a judge and Case No. 13,202 being tried to a jury. The trials required parts of seven days, and the evidence included five witnesses and eighteen exhibits for appellants and twelve witnesses and nine exhibits for appellees. *None of the appellants took the stand and testified although they were present in the courtroom.* Their case principally consisted of calling and cross-examining appellee Hodson as an adverse witness, testimony of a physician (Dr. Anna Coyne Todd), and introducing hospital records of Emergency Hospital for the period April 18, 1954, to April 30, 1954, and St. Elizabeths Hospital records for the period April 30, 1954 to May 6, 1954. Dr. Irma Belk Hobart of St. Elizabeths Hospital was also called as a witness by appellants but had insufficient recollection of the case to testify. Appellants produced no direct testimony supporting their contentions concerning the deed or the will executed on February 2, 1954, or shortly prior thereto or immediately thereafter.

Appellees on the other hand produced witnesses Edna P. Hetzel and Katie May Ayre who testified as to the due

execution of the deed and that Dorothy Smallwood Geare was of sound mind at that time and not under any constraint. The disinterested notary public Glenn C. Russell also testified to the same effect. Witnesses to the will Robert B. Smeltzer, a responsible businessman, and his son, Robert Lionel Smeltzer, a lawyer admitted to practice in the District of Columbia and a businessman, testified that on the same day about three hours after the deed had been executed on February 2, 1954, Dorothy Smallwood Geare was of sound mind and capable of executing a valid deed or contract. The maid, Elizabeth Hagler, testified to the effect that all day on February 2, 1956 Dorothy Smallwood Geare was competent and not under any undue influence. Withstanding a searching cross-examination, Viola A. Hodson testified to the same effect. All of these witnesses as well as others indicated there was no undue influence, coercion, fraud or duress and that Geare was fully competent during this period.

Appellant Hodson testified that she was a close and intimate friend of Dorothy Smallwood Geare and had known her since 1910; that from time to time she loaned her money; that in March of 1942 Geare was an alcoholic who had been put out of her room and Hodson took her into her own home in Crestwood until she could find a place to live but she never left and asked Hodson to let her stay there; that Geare only contributed to her support sporadically; that she paid nothing in the last year of life (1954); that Hodson befriended her in many ways including driving her back and forth to work; that she obtained a job for Geare as an auditor in the Navy Department; that Hodson treated Geare like a sister; that in 1953 Geare's health started to deteriorate and she lost weight after she had her teeth extracted and had a varicose vein operation; that she seemed to tire more easily; that in July 1953 she went on sick leave from her employment but returned and worked December 21, 22, 23, 24, 1954; that she voluntarily retired after the end of December 1954; that Geare con-

tinued to look after her own affairs and contracted with a Mr. Ward in September 1953 to repair her house at 3047 Porter Street, N.W.; that she attended a Christmas party at the home of Mrs. Marguerite Hynson going and coming by herself; that her mental condition was sound at all times until Geare had a heart attack on March 22, 1954; that after that she became confused; that on April 18, 1954, she was taken to Emergency Hospital where she was more disoriented and confused; that she thought she was in San Francisco; that she got out of bed and walked around; that she was under sedation; that the officials at Emergency Hospital said they didn't have the facilities to look after Geare; that Hodson then made arrangements to transfer Geare to St. Elizabeths where she was transferred on April 30, 1954; that she was only there a week when she seemed better and asked Hodson to take her back into her home; that there was no adjudication and formal commitment; that the hospital officials at St. Elizabeths authorized Geare's return to Hodson's home on May 6, 1954; that Geare improved physically and mentally after that; that Geare was able to go out for hairdressing on August 18, 1954, and September, 1954; that on October 5, 1954, Hodson had to leave for Boston and she had no one to leave with Geare so she put her in Emergency Hospital at her physician's suggestion; that on Hodson's return Geare was worse; that on December 28, 1954, she died.

Witnesses Hynson, Studt, Hetzel, Hagler and Hodson testified in substance that around December, 1953, and January and February, 1954, Geare discussed disposition of her property; that she wanted the residue of her estate to be divided equally between Hodson and Margaret Hynson Studt, her godchild, who was the daughter of her college schoolmate, Mrs. Marguerite Hynson; that she wanted to deed the real estate to Hodson in order to increase the existing encumbrance so as to pay for repairs to continue to have the property rentable; that thereafter she wanted to deed the property to Hodson and Studt equally with the

understanding that the income from the property would be paid to Geare for life. With this agreement Geare conveyed property to Hodson on February 2, 1954, and after increasing the trust on April 13, 1954, Hodson conveyed an undivided one half interest to Studt. (Appellees' App. 2, 3)

The considerable body of direct evidence for appellees amply supports the findings of the court on November 3, 1955, which read as follows:

. . . . . .

The Court: The issues relating to the validity of the will have been passed upon by the jury.

Consolidated with the will contest, was the action to set aside the deed, and that action has to be determined by the Court without a jury.

The Court stated, however, at the opening of the consolidated trial, that it would treat the verdict of the jury as advisory on those issues which were common to both cases. And treating the verdict as advisory, the Court is going to accept it and follow it.

The Court might add that even if there were no advisory jury, the Court would independently reach the same conclusion.

The Court finds that as of the date of the execution of the deed, the deceased had mental capacity to execute it;

That the execution of the deed was not procured by any undue influence or fraud;

And that the deed was intended to be a conveyance of the property in fee simple absolute, subject to a conveyance of a half interest to Mrs. Studt to whom Mrs. Hodson actually conveyed that half interest.

The Court in conclusion may make the following comments.

The evidence on the issue of mental capacity was overwhelming that on February 2, and generally around that date, the decedent was in full possession of her mental faculties, and that she was fully aware of what she intended to do, and did exactly what she intended.

In fact, she would have been an ingrate if she had not given substantial recognition to Mrs. Hodson,

who befriended her; who gave her a home in her declining years; and who was not being sufficiently or fully compensated for the room and board, and the care and the services, that she rendered.

The Court was impressed by the fact that although the psychiatrist found the testatrix of unsound mind sometime after she had a heart attack, and the psychiatrist testified that the condition must have existed for sometime prior to the examination, there was not a single witness who saw the decedent on or about February 2—some of whom were interested witnesses, but some of whom were disinterested—I repeat, there was not a single witness who saw the decedent around that time who testified that she was otherwise than normal from a mental standpoint.

The Court was impressed also by the circumstance that the caveators, the nephew and nieces, did not testify on this issue, or on any other issue. They did not testify because they did not know. They were not there. They never called to see their elderly aunt, although they were all living within easy distance. Their aunt was being befriended by a stranger, and yet this nephew and these nieces never having seen their aunt about this time, caused a document to be filed in this Court, alleging, in effect, that she was insane at that time. It seems to the Court that they were playing an ignoble part. I think it was due to thoughtlessness, rather than to evil intent, because they are estimable and respectable people. But greed and cupidity sometimes makes even respectable people stoop to ignoble things.

They also caused a document to be filed attacking Mrs. Hodson as having exercised fraud and undue influence. The Court was impressed with the sincerity and the probity of Mrs. Hodson. She withstood a very able and skillful cross-examination, conducted in the best traditions of the Bar. She gave a very convincing explanation of how the deed and the will came to be drawn and executed. That she acted in good faith is evidenced in part by the fact that she testified that Mrs. Geare, the deceased, instructed her to convey a half interest in the property to Mrs. Studt, the godchild of the deceased, but in the meantime, she was to take the record title in her own name in order that it

would be easier to obtain a loan on the property while Mrs. Studt might be in Panama.

This intent was carried out by Mrs. Hodson, although there was not a scrap in writing proving that Mrs. Geare gave any instructions to Mrs. Hodson to convey a half interest in the property to Mrs. Studt.

This is one of those cases that, unfortunately, happen all too often, where an elderly relative is cared for by a Good Samaritan, but is neglected by members of her own family, who stay away while the elderly relative is living, but spring forward to claim a share in the property after her decease.

I think the verdict of the jury is not only warranted and sustained by the evidence—no other conclusion was reasonable—but it also does equity, and is in accordance with good morals and good conscience.

The Court will render judgment for the defendant on the merits in the action relating to the deed, with costs to be assessed against the plaintiffs.

B. Case No. 13,202

Case No. 13,202 is the will contest over the last will and testament of Dorothy Smallwood Geare dated February 2, 1954. The Appellants, plaintiffs below, contested the will on three grounds namely: (1) mental capacity, (2) undue influence, (3) revocation. At the conclusion of deliberations of jury on the afternoon of November 1, 1955, the jury reached agreement that Geare had mental capacity. The jury was polled and each responded in the affirmative.

Shortly after noon on November 2, 1955, the jury requested additional instructions on issues 2 and 3 and the Court reinstructed them and answered questions. On the next day in the early afternoon the jury returned its verdict on issues 2 and 3 that there was no undue influence and no revocation. The jury was polled and each individual juror stated no to each question.

Insofar as material, the testimony described under A hereof is incorporated by reference.

Disinterested witnesses Robert B. Smeltzer and Robert Lionel Smeltzer proved due execution of the will. Witnesses Edna P. Hetzel, Katie May Ayre, Glenn C. Russell, Elizabeth Hagler and Viola A. Hodson proved the rational conduct of Geare throughout the day of February 2, 1954. Geare had luncheon downstairs when she was fully dressed; executed the deed around 5 to 5:30 P.M.; had dinner downstairs; watched newscast over television around seven o'clock; retired to her bedroom; executed will around 8 P.M. During day she even transacted some business. (Tr. 410)

Witnesses Studt, Hynson, Hetzel and Hodson testified of desire of Geare during end of December, 1953, and January and February, 1954, to dispose of her property by will giving the residue to Hodson and Studt equally. Maid Hagler testified as to scraps of notes made by Geare around this time which she found on floor. (Tr. 475) Witness Hodson referred to handwritten notes made by Geare in January, 1954. (Appellees' App. 5, 6, 7) Witness Hodson produced original letter dated February 17, 1954, (Appellees' App. 9) from Geare which reads in part:

> "I am writing this memo in order to facilitate your work in disposing of my tangible personal property mentioned in item 'IV' of my Will dated February 2, 1954.
>
> First I wish to express to you, my devotion and gratitude for your love and care, and above all for your unfailing faith in me. Many times when all the world seemed black you have boosted my spirits and given me a new outlook on life. I shall be ever grateful for all your goodness to me.
>
> The years since I came to you, in March, 1942, have been happy ones. As I have told you I have lived in your house longer than any place since I was born July 5, 1889. I wish to thank Frank for all of his understanding care that has really made me feel secure in your home. Katie and Edna too, share in my grate-

ful thanks. They have been wonderful understanding friends, and I love them dearly.

* * * * * * *

"To the children of my brother, namely Grahame T. Smallwood, Jr., Elizabeth Anne Wier and Eleanor Warrene Beasley, such photographs or family mementos they might desire, should they evidence any interest, but doubt that they will do."

* * * * * * *

To show cordial relationship between themselves and Geare, Appellants introduced and read to jury the following: (1) Plaintiff's Exhibit 16 which was a letter dated November, 1948, giving permission to Grahame Smallwood to copy certain lineage papers and giving certain family background which was signed "Affectionately, Aunt Dorothy" and (2) a Christmas card with a note from Aunt Dorothy expressing "Love and best wishes for 1953." (Tr. 190 *et seq.*)

Witness Phyllis M. Carpenter was Geare's supervisor at the Navy Regional Accounts Office of the Navy Department. She testified Geare was absolutely of sound mind in December, 1953 (Tr. 399); that Geare was an invoice auditor and very competent; that she saw Geare around latter part of February or early March, 1954, at Hodson's home; that Geare "definitely was of sound mind" (Tr. 400). Hodson used to bring her to work and occasionally she rode the bus (Tr. 406).

Witness Edna P. Hetzel testified that Geare's mental condition was good even to early March, 1954, but she was in rundown physical condition and had lost weight (Tr. 409). Geare was well taken care of by Hodson; anything Geare desired she had; and all the care she needed through the years (Tr. 420 *et seq.*). Hodson took her riding and fixed anything she wanted to eat. "It was a very loving kindness there." (Tr. 421) Witness Ayre stated Hodson

treated Geare same as she did Ayre and Ayre was Hodson's sister (Tr. 450).

Witness Grissinger testified Geare was in her hairdresser shop as late as September, 1954, and on August 18, 1954 (Tr. 463), but never saw anything wrong with her mind (Tr. 465). "She had a brilliant mind" (Tr. 465).

Witness Hagler said as to clippings that Geare stated she was changing her will; that Geare said "'Well, I am changing it because my relatives I haven't seen for some time.' And she says, 'No one loves me.' And she said, 'But for Mrs. Hodson, I would be sleeping in the park.'" (Tr. 475).

Witness Sisk a real estate broker saw Geare once a week in January and February, 1954 and he was of good mental condition. Witness Greenstreet testified to the same general effect.

Witness Hynson testified she and Geare were College classmates in 1908 and had been friends thereafter; (Tr. 497); that they had Christmas dinner in 1953; that in January, 1954, Geare spoke to her about changing her will and she and her daughter Studt visited Geare; that Geare was then working on her income tax return (Tr. 498); that Geare said she wanted to include Studt in her will (Tr. 499); that her mental condition in December, 1953, and January, 1954, was as clear as it ever was.

Witness Studt corroborated her mother's testimony (Tr. 510) including Geare's statement that she intended to make her a beneficiary under her will (Tr. 513).

The only testimony as to revocation was that Geare accidentally tore the carbon copy of the will (Defendant's Exhibit No. 2) thinking she was tearing up the carbon of a 1948 will. Hodson testified consistently "And when she tore it, she (Geare) asked me if I would mend it. And she held it, and I put the Scotch tape on it for her" (Tr. 188).

The Record

Appellants were ordered by the District Court (Appellees' App. 1), following motion and argument, to file additional parts of the transcript containing the complete charge of the Judge to the Jury and colloquy of counsel and the Court relating thereto, but failed to comply, necessitating the Appellees to do this. Added parts of charge are printed in Appellees' App. 11, 12, and other added parts are in Transcript.

STATUTES AND RULES INVOLVED

Title 14, Section 308, D. C. Code, 1951 Ed.:

> "In the courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or his legal representative, to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity, whether such information shall have been obtained from the patient or from his family or from the person or persons in charge of him. * * *"

District of Columbia Code, 1951 Ed., Section 21-311:

> "Upon the filing with the court of a verified petition as hereinabove provided, accompanied by the affidavits of two or more responsible residents of the District of Columbia setting forth that they believe the person therein named to be insane or of unsound mind, the length of time they have known such person, that they believe such person to be incapable of managing his own affairs, * * * the court, or any judge thereof in vacation, may, in its or his discretion, issue an attachment for the immediate apprehension and detention, *for preliminary examination*, of such person in Saint Elizabeths Hospital and, unless found by the staff of Saint Elizabeths Hospital to be of sound mind, therein for a period not exceeding thirty days." (Italics supplied)

Federal Rules of Civil Procedure, Rule 75(b):

> "* * * If the designation includes only part of the Reporter's transcript, the applicant shall file a copy of

such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed."

SUMMARY OF ARGUMENT

1. Extensive cross-examination of Appellee Hodson by able counsel using the Petition De Lunatico Inquirendo was permitted by the trial judge and this was proper on the basis of possible admission against interest or to attack credibility. The Petition itself signed and sworn to by Appellee Hodson was admitted into evidence.

To permit the introduction of the physician's affidavits would have been prejudicial. First they were not admissions. Second they might be considered by the jury to be statements of physicians as to mental capacity at an earlier date without the opportunity of cross-examination. Third, the physicians themselves were available if such testimony was admissible under Title 14, Section 308, D. C. Code, 1951 Ed., *supra*. Fourth, if their testimony was not properly admissible under Title 14, Section 308, D. C. Code, *supra*, the affidavits would not be admissible. Fifth, they were not relevant; since the significant date for the deed and will was February 2, 1954. Sixth, there was no formal hearing before the Mental Health Commission (only a preliminary hearing) and there never was a final order of adjudication. A person is presumed sane until adjudicated insane.

2. Plaintiffs' Exhibit No. 14 (Appellant's App. 32), is an unsigned Report on Information which was extensively used by Appellants for cross-examination purposes (Appellant's App. 28, et seq.). There was no proof that this was the person Appellee Hodson spoke to. The best evidence to impeach would have been the official the witness was in contact with at the hospital. This was not a hospital record of routine entries on a patient such as pulse,

blood pressure, etc., which are admissible. Furthermore, the witness testified "most of the things he asked me, he made just check marks. He made no notation excepting on amount, I believe, as I remember" (Appellant's App. 31). The accuracy of the unsigned, unsworn document was questioned by the witness under oath. The witness also under oath denied: (1) telling the official that Geare had "visual hallucinations"; (2) that Geare would greet people who were not there (Appellant's App. 32). It contains opinion material.

3. The instructions of the Court to the jury were not prejudicial. The trial lasted five trial days. There was much evidence. The cost to the taxpayers as well as to the litigants was a consideration to be taken into account in making every reasonable and fair effort to have the jury reach a verdict.

ARGUMENT

Point No. 1. The District Court Properly Excluded From the Evidence the Affidavits of Drs. Campbell and Cohen. To Have Admitted Such Affidavits Would Have Been Highly Prejudicial

The will of Dorothy Smallwood Geare was executed by her on February 2, 1954. The conveyance of the real estate was also executed and acknowledged by her on February 2, 1954.

On the 18th day of April, 1954, Dorothy Smallwood Geare was ill in Emergency Hospital. Her condition worsened; she was disoriented and confused; she would get out of bed; and on April 30, 1954, Appellee Hodson, as next friend, executed a Petition *De Lunatico Inquirendo* with respect to Geare. This petition is known as Mental Health No. 600-54. Geare was transferred from Emergency Hospital to St. Elizabeths Hospital on April 30, 1954, and the case was set down for a hearing to be held on May 11, 1954, before the Mental Health Commission. Following her admission to

St. Elizabeths Geare improved, according to Hodson's testimony. Prior to the date set for hearing before the Mental Health Commission, Hodson, at Geare's request, asked the discharge of Geare, and she was discharged on May 6, 1954, to her custody and the case was closed. There was no formal hearing before the Mental Health Commission and, of course, *there was no final order of adjudication.* A person is presumed to be sane until adjudicated to be insane. *Rudolph* v. *United States*, 36 App. D.C. 379, 385; 31 C.J.S. Evidence, Sec. 147, p. 826; 68 C. J. Wills, Sec. 43, p. 444.

The issue involved in the instant case is the mental capacity of Dorothy Smallwood Geare on February 2, 1954, not the issue of whether or not she was in need of care and treatment on the subsequent remote dates of April 30-May 6, 1954. It would be prejudicial to interject such proceedings into this case when Mrs. Geare was not adjudicated to be of unsound mind in such mental health proceedings.

In *Labofish* v. *Berman*, 60 App. D.C. 397, 55 Fed. 2d 1022, the Court of Appeals said:

> "The last exception relates to the refusal of the court to allow the physician who attended testator immediately prior to and at the time of his death to express an opinion as to his mental condition at that time. It is perhaps sufficient to say, as to this, that the issue was not the ability of the testator at the time immediately before his death to make a will, but *as of the time it was made* • • • ". (p. 400)

The Court of Appeals also said in *Thompson* v. *Smith*, 70 App. D.C. 65, 103 Fed. 2d 936;

> "The crucial question in the case was whether or not the decedent was of sound and disposing mind *at the moment of execution of the will.*" (p. 69)

There are many authorities to the same effect. 68 C. J. Wills, Sec. 9, page 416. The issue on which direct proof must be adduced, as distinguished from indirect or sub-

sidiary proof, is the mental capacity of Dorothy Smallwood Geare on February 2, 1954, *at the moment that the will was executed.*

Proceedings under the Mental Health Act are not final and do not adjudicate anything as to mental competency until the Court makes an order finally adjudicating the patient. This is clear from the following sections of Title 21, D. C. Code (1951):

> Section 312. "Upon receipt of the report and recommendation of the commission, a copy shall be served personally upon the *alleged insane person* . . . together with notice that he has *five days within which to demand a jury trial.* A demand for hearing by the court, or a demand for jury trial for the *purpose of determining the sanity or insanity* of the *alleged insane person* may be made by the said *alleged insane person* . . . or *a jury trial may be ordered by the Court upon its own motion* . . . " (Emphasis supplied)

The words "*alleged insane person*" and the words "*purpose of determining the sanity or insanity*" appearing so often clearly show that the proceedings are only an inquiry and that there is no finality until an adjudication. This is strengthened by the following:

> Section 314. "*If no demand be made for a jury trial,* the *Judge* holding court *shall determine the sanity or insanity of the said alleged insane person,* but such *Judge may* in his discretion, *require other proofs, in addition to the petition and report of the commission,* or *such judge may order the temporary commitment of said alleged insane person for observation or treatment* for an additional period of not more than thirty days. The *Judge may,* in his discretion, *dismiss the petition notwithstanding the recommendations of the commission.* If the Judge be satisfied that the *alleged insane person is of sound mind he shall forthwith discharge such person and dismiss the petition.*"
>
> Section 315. "If the Judge be satisfied that the *alleged insane person* is insane, or if the jury so find, the

Judge *may* commit the insane person. . . ." (Emphasis supplied)

The mere filing of a petition for a writ *de lunatico inquirendo* is not an adjudication nor does it raise a presumption of incompetency. State ex rel. *Bevan* v. *Williams*, 316 Mo. 665, 291 S.W. 481:

> "The filing of an information alleging that an individual is of unsound mind does not render him non sui juris; it raises no presumption of incompetency." (p. 484)

68 C. J. Wills, Sec. 66f, with reference to adjudication as to sanity states at page 460:

> "An adjudication of insanity prior to the execution of the will has been held admissible. While, according to some decisions, evidence of an adjudication of unsoundness of mind after the execution of the will has been held admissible, under other decisions the record of an adjudication of lunacy or of mental unsoundness in a proceeding to set aside an instrument executed by the testator subsequent to the execution of the will is inadmissible at least where the statute regulating inquiries into sanity makes no provision for *retroactive findings*. Likewise, an adjudication after the execution of a will that the testator was incompetent to make a deed has been held inadmissible." (citing cases)

The District of Columbia mental health statute makes no provision for retroactive findings.

In *Barbour* v. *Moore*, 4 App. D.C. 535, 547, the Court said:

> "The incapacity alleged must exist at the time of executing the will. The proof of incapacity at any prior time or subsequent time, while it may furnish evidence reflecting on the condition of the testator's mind at the date of the will, will not relieve the party assailing the will from the necessity of establishing, by clear proof, the existence of the mental incompetency at the time of executing the paper."

Even if Mrs. Geare had been adjudicated—which she was not—the petition for the writ, the affidavits attached thereto, the reports of the Mental Health Commission and the evidence adduced at the mental health hearing would not be admissible in the will contest since the only admissible fact would be the fact of insanity. The leading case on this point is *Leggate* v. *Clark*, 111 Mass. 308, 7 A.L.R. 573, cited with approval in subsequent cases. In that case husband and wife executed a deed while the husband was insane. In Massachusetts this is a void transfer unless a Judge consents. An Order of a Probate Judge *committing* the husband to a mental hospital was admitted in evidence as *prima facie* evidence of insanity. This was held to be error. These insanity proceedings were under a statute which "authorizes judges of probate to commit to either of the state lunatic hospitals any insane person who in their opinion is a proper subject for its treatment or custody". It was contended that since all of the evidence introduced in the proceedings to set aside the deed had been introduced in the insanity proceedings that no one was prejudiced. As to this the Court said (pp. 310, 311):

> "The demandant contends that as all the evidence upon which the judge of probate based his order was subsequently introduced in this case, and as the other evidence tended strongly to show the insanity of Leggate, the tenant was not prejudiced by the admission of the record. But it is impossible for us to say what effect the evidence and the instructions thereon had upon the minds of the jury. They may have had a controlling influence in leading their minds to the verdict which they rendered."

A case similar to the Leggate case is *Kelly* v. *Moore*, 196 U.S. 38, 25 S. Ct. 260, 49 L. Ed. 376, affirming *Kelly* v. *Moore*, 22 App. D.C. 9. Here an action of ejectment was brought in the District of Columbia Court by the grantees of the heirs of William Thomson, in which the will of Thomson was attacked on the grounds of insanity and undue influence. Previous to the execution of the will Thom-

son had been in an insane institution for a short time. He was committed at the request of a cousin and upon the certificates of two doctors. He was in the hospital for six weeks and was granted a leave of absence on probation three weeks before he executed his will. The attesting witnesses testified as to his mental capacity. The Supreme Court said:

> "In this connection exception was taken to the exclusion of the application of James E. Cunningham for the admission of Thomson to the insane asylum, and of the certificate of the two physicians as to his insanity. These were properly excluded, not only because they were unsworn testimony, but because they were given in a different proceeding and upon a different issue. Thomson may have been insane to the extent of being dangerous if set at liberty, and yet may have had sufficient mental capacity to make a will, to enter into contracts, transact business and be a witness. In the case of *Leggate* v. *Clark*, 111 Massachusetts, 308, the admission of similar testimony was treated as error."

In *Lewandowski* v. *Zuzak*, 1923, 305 Ill. 612, 137 N. E. 500, the Illinois Court used the same quotation to exclude the same type of evidence. Here the will was executed March 16, 1916, and *7 days later* on March 23, 1916, deceased was adjudged insane and was committed to an insane institution. The will was admitted to probate in 1919. At the trial the order of the County Court committing testator to the hospital, *including the report of the two doctors appointed by the court* who found testator insane were admitted into evidence. The court held the admission was error for the same reason cited by the Supreme Court.

The Mental Health Commission is not a judicial body and its reports and recommendations are not admissible as shown above, and also upon the following authorities.

In *Universal Airline, Inc.* v. *Eastern Air Lines, Inc.*, 88 U. S. App. D. C. 219, 188 F. 2d 993, an action in negligence arising out of collision of two aircraft. Deposition of Civil Aeronautics Inspector not allowed in evidence. This was held proper and the court said (p. 226):

> "Moreover, the conclusions or opinions of the administrative agencies or boards or any testimony reflecting directly or indirectly the ultimate views or findings of the agency or board are generally held inadmissible because they would tend to usurp the function of the jury. As Wigmore maintains, the phrase 'usurp the functions of the jury' is not accurate, but nevertheless such testimony is inadmissible because it falls within the general rules which exclude hearsay and opinion evidence. The *reports of ex parte hearings and investigations* are generally excluded, not because of danger of 'usurpation of the jury's functions', but because the evidence is improper and irrelevant, *even* if the hearing is before a judge sitting without a jury."

In *State ex rel. Sathre* v. *Roberts*, 67 N. D. 92, 269 N. W. 913, 108 A. L. R. 37, a *quo warranto* proceeding to determine if Roberts was unfitted for a judicial position by reason of his having been committed to a State insane hospital. The following syllabus is by the Court:

> "5. Chapter 23, Sess. Laws 1879, Sec. 2547 to 2579, Comp. Laws 1913, as amended, establishes a hospital for the insane, provides for the organization of a board of commissioners of insanity in each county, and creates a method for determining who are fit subjects for treatment in such hospitals."

> "6. The *findings of the board of commissioners* of insanity *that a person is insane and a fit subject for treatment* in the hospital for the insane has *no bearing upon his legal mental status.* The effect of such finding is to admit one to the asylum for treatment and it is not entitled to the faith and a credit of a judgment of a court, as the *members of such board do not act as judicial officers, but as a special board having special powers only.*"

In *Ex Parte Dubina* (1945) 18 N. W. 2d 902, 311 Mich. 482, habeas corpus proceedings were instituted to obtain release from insane institution. In 1941 Dubina successfully asserted the defense of insanity in his murder trial. At the murder trial the sanity commission, consisting of three psychiatrists, testified that Dubina was not insane. In the habeas corpus proceedings Dubina attempted to introduce the report of the sanity commission to prove that he was sane but the report was excluded. The Court of Appeals held this exclusion correct and said (p. 903):

> "The issue in this present proceeding is the sanity of the appellant at the time of this hearing, not as of the time the original case was tried."

In Re Ryman (1940 Pa. Sup. Ct.) 11 A 2d 677, Ryman was committed on July 12, 1938, to a state insane hospital upon the petition of the daughter and affidavits of two doctors pursuant to the provisions of the Mental Health Act. The petition prayed for appointment of a guardian. Ryman filed an answer denying insanity and demanded a jury trial. The affidavits of the doctors were admitted into evidence and this was held error (p. 680):

> "The Court also seems to have been of the opinion that the Act of the two physicians. . . . in making affidavit that George Ryman's mental condition was such as to warrant his admission to a hospital was an *adjudication* or legal determination of his lunacy. It was not. It was only an ex parte affidavit, which justified the hospital in securing him as a patient, if done in good faith, but it adjudicated nothing as to lunacy. . . . *Affidavits of physicians under the Mental Health Act . . . without further action of the court, are not an adjudication of anything.*" (Emphasis supplied)

The Trial Court did permit cross-examination of Appellee Hodson from the petition and permitted its introduction into evidence. This was proper. The affidavits were not admissions. There was no opportunity for cross-examination of the physicians. The Court did in fact per-

mit Appellants to produce testimony from two St. Elizabeth's physicians Drs. Hobart (Tr. 81 *et seq.*) and Todd (Tr. 91-115) and much of the hospital records from Emergency Hospital (Pltf's. Exhibit 18). At best these affidavits would have been corroborative. There is doubt that Drs. Hobart and Todd should have been permitted to testify for Appellants against the will and deed under Title 14, Section 308 D. C. Code 1951 Ed. supra. But to have added these affidavits would have been further prejudice. As long as Drs. Hobart and Todd were permitted to testify the Court would probably have permitted Drs. Campbell and Cohen to testify had Appellant's seen fit to call them, which they didn't, Drs. Campbell and Cohen being available. In any event the affidavit material was already in the case in other ways.

Point 2. The District Court Properly Excluded the Unsigned Report on Information Containing the Name Dr. Steinkirchner—J. M. W.

The report opens with a note of opinion. (Appellant's App. 32). It then contains information written by someone who was not produced at the trial. It is hearsay on hearsay. Routine entries of observed facts such as pulse, blood pressure, amount of urine voided, etc., are not included. It contains conjecture which is at variance with sworn testimony such as "In September of 1953, the patient had an episode that was possibly a nonparalytic cerebro-vascular accident in which her hands suddenly went limp and cold" (Appellant's App. 33). There is no testimony in the case to support this statement. "During the early months of 1954, the patient seemed to be going more and more into a stupor" (Appellant's App. 33). Even Drs. Hobart and Todd admitted they had no first-hand information or knowledge prior to their examinations of Geare in May, 1954. Hodson denied under oath she had said that Geare had stopped reading in March and April, that Geare had visual hallucinations, or Geare would greet people not there. Appellee Hodson was under strict cross-

examination; certainly she had the same right as to any person seeking to contradict her.

The statement was further inaccurate when it states that Geare went to Emergency Hospital on *February 18*, Geare went on April 18. That was undisputed in the testimony.

The statements along the following lines are already repeated throughout the testimony: that beginning in January, 1953, Geare lost weight; that she was fatigued in 1953; that her appetite fell off; that she had heart attacks in March and April; that she was disoriented and confused while at Emergency Hospital from April 18-30, 1954; that she thought then that she was in San Francisco; that at Emergency Hospital she got out of bed and pulled clothes of other patients; that they then asked that she be removed from the hospital; that on the 30th she was brought to St. Elizabeths. This much was conceded. If error to exclude, it was harmless error.

This statement was properly excluded under *New York Life Insurance Company* v. *Taylor*, 79 U. S. App. D. C. 66, 147 F. 2d 297; *Clairos* v. *United States*, 82 U. S. App. D. C. 278, 163 F. 2d 593; *Palmer* v. *Hoffman*, (N.Y. 1943) 318 U. S. 109, 87 L. Ed. 645, rehearing denied 318 U. S. 800, 87 L. Ed. 1163.

Point 3. The District Court Did Not Err in Its Instructions to the Jury When the Jury Asked for Further Instructions and When the Court Requested the Minority Individual or Individuals to Give Consideration to the Views of the Majority

The Court's charge was proper under the circumstances. After five days of trial with many witnesses and much evidence, the jury retired on the afternoon of Nov. 1. At 5:30 P.M. the jury returned a verdict that decedent had sufficient mental capacity. The jury was polled and each juror responded affirmatively.

The next day around noon the jury requested the Court to reinstruct it on issues 2 and 3, undue influence and revocation and this was done (Appellees' App. 11, 12). Questions of juror No. 8 were answered and at 12:25 P.M. the jury retired. But shortly thereafter at 2:55 P.M., after lunch, they returned stating they appeared to be a hung jury, having been out only the afternoon of November 1 and a little longer than the morning of November 2. The Court was entirely proper in pointing out that the trial had lasted parts of 5 days and cost the taxpayers a considerable amount of money and should be decided if possible. He then made appropriate suggestions pointing out that opinions may change through discussion but each should give deference to views of others and not hold to a blind determination that verdict should represent his view only. On the early afternoon of November 3 the verdict was reached on issues 2 and 3.

Issue 1 on mental capacity had already been decided.

CONCLUSION

A. Case No. 13,201 as to the deed was tried by a judge on the questions of mental capacity and undue influence. His findings of fact should not be disturbed on appeal unless clearly erroneous. Due regard should be given to the opportunity of the Trial Court to judge the credibility of the witnesses and make findings of fact. *Hazen* v. *Hawley*, 66 App. D. C. 266, 86 F. 2d 207, *Strain* v. *Minus*, 123 Conn. 275, 193 A. 754.

In the *Hazen* case, *supra*, the Court said:

> "• • • Under the rule settled in this jurisdiction, while we are not absolutely bound by a chancellor's findings of fact, we do not disturb them on appeal unless upon an examination of the evidence they are clearly wrong (citing many cases) • • •" (p. 271).

The judgment entered by the Trial Court should not be disturbed.

B. Case No. 13,202 concerns the will contest. No harmful error was committed and the judgment on the verdicts below should be affirmed.

Respectfully submitted,

THOMAS M. RAYSOR,
CARLTON L. SAUNDERS,
Attorneys for Appellees.

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APPENDIX

(Filed 2/21/56)

Order Requiring Appellants to File Additional Parts of Transcript of Record Under Rule 75(b) and Extending Time for Filing Record on Appeal and for Docketing Appeal

This case coming on to be heard on Appellees' motion to require Appellants to file additional parts of transcript of record under Rule 75(b) of the Federal Rules of Civil Procedure, and argument thereon, it is by the Court this 21 day of February, 1956,

ORDERED, That the Appellants be and they hereby are required to file additional parts of the transcript of record containing the complete Charge of the Judge to the Jury and colloquy of counsel and the Court relating thereto; and it is further

ORDERED, That the time for filing the record on appeal and for docketing the appeal in this action be and the same hereby is extended for a period of ten (10) days from February 20, 1956, to and including March 1, 1956.

ALEXANDER HOLTZOFF
Judge

Seen:

PAUL B. CROMELIN
Paul B. Cromelin

THOMAS M. RAYSOR
Thomas M. Raysor
Attorneys for Appellees

s/ ARTHUR J. HILLAND
Arthur J. Hilland

s/ THOMAS N. KINDNESS
Thomas N. Kindness
Attorneys for Appellants

(April 14, 1954)

THIS DEED

Made this second day of February in the year one thousand nine hundred and fifty-four, by and between Dorothy Smallwood Geare of the city of Washington, District of Columbia, party of the first part, and Viola A. Hodson, also of said City and District, party of the second part:

Witnesseth, that in consideration of Ten Dollars ($10.00) Dollars the party of the first part does hereby grant unto the party of the second part, in fee simple Lot 83, Square 2061, all that piece or parcel of land, together with the improvements, rights, privileges and appurtenances to the same belonging, situate in the District of Columbia, described as follows, to wit: Lot Eighty-three (83) in Square Two Thousand Sixty-one (2061) with the improvements thereon known as 3047 Porter Street; Northwest, Washington, D. C.

(Stamps)

And the said part of the first part covenant that she will warrant specially the property hereby conveyed; and that she will execute such further assurances of said land as may be requisite.

Witness my hand and seal the day and year hereinbefore written.

DOROTHY SMALLWOOD GEARE (Seal)

In Presence of—
EDNA P. HETZEL
KATIE MAY AYRE

District of Columbia, to wit:

I, Glenn C. Russell, a Notary Public in and for the District aforesaid, Hereby Certify that Dorothy Smallwood Geare who is personally well known to me as the grantor in, and the person who executed the aforegoing and annexed deed, dated February 2, A. D. 1954 personally appeared

before me in the said District and acknowledged the said deed to be her act and deed.

Given under my hand and seal this 2nd day of February, 1954.

GLENN C. RUSSELL
Notary Public D. C.

(Seal)

My Commission Expires Oct. 31, 1955.

THIS DEED

Made this 13th day of April in the year one thousand nine hundred and Fifty-four, by and between Viola A. Hodson of the city of Washington, District of Columbia, party of the first part, and Margaret Hynson Studt, also of said City and District, party of the second part:

Witnesseth, That in consideration of Ten Dollars ($10.00) Dollars, the party of the first part does grant unto the party of the second part, in fee simple an undivided one-half interest, right and title in and to all that piece or parcel of land, in the District of Columbia, described as follows, to wit: Lot Eighty-three (83) in Square Two Thousand Sixty-one (2061) with the improvements thereon known as 3047 Porter Street, Northwest, Washington, D. C. together with the improvements, rights, privileges and appurtenances to the same belonging.

And the said party of the first part covenants that she will warrant specially the property hereby conveyed and that she will execute such further assurances of said land as may be requisite.

Witness her hand and seal the day and year hereinbefore written.

VIOLA A. HODSON (Seal)

In presence of—
PAUL B. CROMELIN
RICHARD L. WALSH

District of Columbia, to wit:

I, Marguerite G. Wimmer a Notary Public in and for the District of Columbia, Do Hereby Certify that Viola A. Hodson of the City of Washington, District of Columbia, party to a certain Deed, bearing date on the 13th day of April, 1954, and hereto annexed, personally appeared before me in said District the said Viola A. Hodson being personally well known to me as the person who executed the said Deed, and acknowledged the same to be her act and deed.

Given under my hand and seal this 13th day of April, 1954.

MARGUERITE G. WIMMER
Notary Public, D. C.

(Seal)